

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ERIC SOLTERO**

Claimant

VS.

**NATIONAL BEEF PACKING CO.**

Respondent

AND

**FIDELITY & GUARANTY INS. CO.**

Insurance Carrier

Docket No. **1,014,091**

**ORDER**

This case involves a dispute over attorney fees. Peter J. Antosh, on behalf of claimant's former attorney, Jesse B. Garcia, requests review of the October 8, 2008 Order by Administrative Law Judge Pamela J. Fuller. The Board placed this appeal on its summary docket for disposition without oral argument. Both Mr. Antosh and claimant's current attorney, Scott J. Mann, filed briefs with the Board setting forth their respective arguments.

**APPEARANCES**

Peter J. Antosh of Dodge City, Kansas, appeared on behalf of Garcia & Antosh, LLP as claimant's former attorney. Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record consists of the transcript and attached exhibits from the October 8, 2008 Motion Hearing held before Judge Fuller and the administrative file compiled in this claim.

**ISSUES**

This is a dispute over attorney fees. Claimant hired Jesse B. Garcia on October 23, 2003, to represent him in this workers compensation claim. In August of 2006, while this claim was being litigated, claimant terminated his attorney client relationship with Mr. Garcia and hired attorney Scott J. Mann. Mr. Mann then represented claimant to the

conclusion of the initial claim. The claim was resolved by an Agreed Award on April 10, 2007, but no provision in that Agreed Award referenced Mr. Garcia's attorney lien. And although the Agreed Award contained boilerplate language approving claimant's attorney's fee contract, the administrative file does not contain a contract of employment between claimant and Mr. Mann.

After conducting a hearing on October 8, 2008, Judge Fuller found that claimant's former attorney's firm was entitled to reimbursement of actual expenses in the amount of \$692.34 as well as attorney fees in the amount of \$1,500 for an estimated 12 hours of work performed.

Mr. Antosh requests review of whether the ALJ erred in apportionment of attorney fees. Mr. Antosh argues that claimant's former attorney obtained an offer for settlement for the same percentage of disability for which the claim was ultimately resolved. Consequently, Mr. Antosh further argues the former attorney is entitled to a lien for 25 percent of that amount.

Mr. Mann argues that claimant's former attorney failed to produce contemporaneous billing records relative to his representation of claimant and therefore his attorney fees should be denied. In the alternative, Mr. Mann argued that Mr. Garcia's fee should be based upon quantum meruit after review of the chronological timeline exhibit offered by Mr. Garcia at the motion hearing in order to determine the time Mr. Garcia spent representing claimant.

The only issue before the Board on this review is whether claimant's former attorney should receive a greater amount of attorney fees for the services rendered claimant in this proceeding and, if so, how much.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Briefly stated, on October 28, 2003, Mr. Garcia began representing claimant in his claim against National Beef Packing Company. Mr. Garcia's employment contract with claimant was filed with the Division of Workers Compensation on November 24, 2003. That representation continued until claimant terminated the contract with Mr. Garcia on August 22, 2006. Mann then entered his appearance as claimant's attorney on August 31, 2006, and the claim was resolved by an Agreed Award on April 10, 2007.

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<sup>1</sup> At the motion hearing, it was agreed that Mr. Garcia was entitled to \$692.34 in actual expenses which Mr. Mann agreed to reimburse.

A letter dated August 31, 2006, asserting an attorney's lien for an amount based upon a 24 percent whole person functional impairment as well as actual expenses, was sent to claimant, Mr. Mann, respondent's counsel and the ALJ. That letter was file stamped as received by the ALJ on September 1, 2006, and is part of the administrative file in this claim.

During his representation of claimant, Mr. Garcia obtained an offer from respondent to settle the claim based upon a 24 percent rating from Dr. Pratt. Claimant declined that offer as he wanted additional medical treatment. That medical treatment was initially denied by respondent but later provided and included surgery. After claimant recovered from his surgery the respondent offered to settle the claim based upon an 8 percent rating from the surgeon. But claimant felt that he had suffered additional injury during physical therapy after his surgery. As Mr. Garcia was investigating that complaint the claimant terminated his representation by Mr. Garcia.

During his representation of claimant, Mr. Mann sent claimant to Dr. Stein who opined that there was no further medical treatment that would benefit claimant. The parties then agreed to have claimant examined again by Dr. Pratt. Thereafter, an agreed award was submitted to the ALJ settling the claim based upon a 24 percent whole person functional impairment. As previously noted, the Agreed Award did not mention Mr. Garcia's attorney lien even though the letter asserting that lien had been sent to Mr. Mann, respondent's counsel as well as the ALJ. And that letter was filed in the administrative file.

On May 14, 2007, Mr. Garcia again filed a Notice of Attorney's Lien in the amount of \$9,307.87 plus expenses. Apparently there were some calls between counsel regarding the lien and then Mr. Mann sent Mr. Garcia a strident letter dated May 16, 2008, denying knowledge of an attorney lien before the Agreed Award and further denying payment of any attorney fee lien. At the motion hearing, Mr. Mann denied receipt of the August 31, 2006, letter asserting an attorney's lien. But when Mr. Mann entered the case he had requested and received claimant's file from Mr. Garcia. The fact there had been another attorney representing claimant should place the subsequent attorney on notice that there could be an attorney lien for that previous representation and, at a minimum, require inquiry to determine if a lien had been filed with the Division.

Because Mr. Garcia had obtained a settlement offer based upon a 24 percent whole person functional impairment, and the claim was ultimately resolved for that percentage of impairment, he now argues that he is entitled to a fee of \$9,307.07. At the motion hearing, no itemization of time spent representing claimant was offered by either attorney. Mr. Antosh offered a chronological timeline regarding how the claim proceeded. The ALJ apparently used the exhibits to estimate the time spent by Mr. Garcia and determine his attorney fee.

The attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the

disability compensation recovered.<sup>2</sup> Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.<sup>3</sup>

The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.<sup>4</sup> The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 44-536(b), which specifically includes:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney. . .
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must

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<sup>2</sup> See K.S.A. 44-536(a).

<sup>3</sup> See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

<sup>4</sup> K.S.A. 44-536(h).

exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.<sup>5</sup>

In addition to the factors listed above, the Board has considered, among other factors, the following: the proportional relationship between temporary total disability and permanent partial disability benefits collected, the outcome of the claim and the appeals taken to achieve that outcome, the total litigation expenses incurred, the services that each attorney contributed towards proving the claim for permanent partial disability benefits, the fact that monies were disbursed to claimant without withholding an amount for expenses, whether temporary total disability compensation was paid in a manner that would justify an attorney fee from those benefits, the total funds available for paying both fees and expenses, and the contested nature of the proceeding.

Initially, the Board notes that the administrative file does not contain an employment contract between Mr. Mann and claimant. K.S.A. 44-536(b) provides in pertinent part:

All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents, which shall be subject to approval by the director in accordance with this section. **Every attorney, whether the disposition of the original claim is by agreement, settlement, award, judgment or otherwise, shall file the attorney contract with the director for review in accordance with this section.** The director shall review each such contract and the fees claimed thereunder as provided in this section and shall approve such contract and fees only if both are in accordance with all provisions of this section. Any claims for attorney fees not in excess of the limits provided in this section and approved by the director shall be enforceable as a lien on the compensation due or to become due. (Emphasis Added)

K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Although the ALJ's Agreed Award contained boilerplate language approving claimant's contract of employment with his attorney, the administrative file in this matter does not contain a filed employment contract between claimant and Mr. Mann. Absent a filed employment contract, the language in the Agreed Award approving the contract is improper, premature and invalid. If Mr. Mann desires a fee in this matter, he must file and submit his written contract with claimant for appropriate approval.<sup>6</sup> And it is incumbent upon the ALJ to review any submitted document, such as the Agreed Award, in order to determine if it is appropriate and should be signed. In this instance a review of the file would have determined that not

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<sup>5</sup> *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, Syl. 5, 663 P.2d 663 (1983).

<sup>6</sup> K.S.A. 44-536(b).

only was there an attorney lien but also that Mr. Mann's employment contract with claimant had not been filed.

The Board is mindful that Mr. Mann's "Response to Motion For Determination of Attorney Fee" filed with the ALJ on October 7, 2008, states that his contingency fee was reviewed and approved by Special Administrative Law Judge Juhnke. However, the administrative file neither contains Mr. Mann's employment contract with claimant nor an order approving that contract by the Special Administrative Law Judge. A special administrative law judge's authority is limited to specific cases that have been assigned to him or her by the director or cases that are part of a hearing or settlement docket.<sup>7</sup> And this evidentiary file does not contain any indication that this claim was assigned to Special Administrative Law Judge Juhnke nor that it was part of a hearing or settlement docket before the Special Administrative Law Judge.

Moreover, absent detailed itemizations of time spent by the attorneys on this claim, it was improper for the ALJ to estimate the time spent and fashion an award apportioning attorney fees from that estimate. Instead, in order to accurately apportion attorney fees in this case based upon quantum meruit, both attorneys must submit detailed itemizations of the time spent representing claimant in this matter. Consequently, in the interest of justice, this matter must be remanded to the ALJ for rehearing. Upon further hearing the ALJ must then look at all the factors listed in K.S.A. 44-536(b), in order to determine an appropriate apportionment of the attorney fees in this case which by statute should be a reasonable amount for each attorney. And on remand and rehearing the unusual method alleged to obtain approval of Mr. Mann's employment contract by a Special Administrative Law Judge can be established by documentary evidence and explained to the ALJ.

Stated another way, the evidentiary record before the Board simply establishes that both attorneys represented claimant and ostensibly are entitled to fees. But Mr. Mann is not properly entitled to attorney fees because he failed to file a written contract of employment as required by statute. As a result, the reasonableness of his attorney fee has not been approved as mandated by statute. Mr. Garcia has not submitted a detailed itemization of time spent on his representation of claimant and consequently an appropriate fee under quantum meruit cannot be ascertained. Consequently, it is necessary to remand this matter to the ALJ for rehearing based upon the foregoing comments.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 8, 2008, is reversed and remanded for further proceedings.

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<sup>7</sup> K.S.A. 44-551(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Peter J. Antosh, Claimant's Former Attorney  
       Scott J. Mann, Attorney for Claimant  
       D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier  
       Pamela J. Fuller, Administrative Law Judge